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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No.....

ARMOUR AND COMPANY, a Corporation, PETITIONER,

against

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION.

The petitioner, ARMOUR AND COMPANY, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit (hereinafter styled the Circuit Court) entered in the above case on November 5, 1945; supplemented by a further opinion on petitioner's prayer for rehearing on January 8, 1946; and in which a petition of the National Labor Relations Board for further rehearing was denied by order of May 9, 1946.

The opinions of the court below; the statutes involved; and the specific errors complained of, are fully set forth in the accompanying record, and, under appropriate and identifying titles, in the brief contemporaneously filed in support of this petition.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Clear understanding of the exact questions involved in this petition is made difficult by reason of the many factual and legal issues involved in the original proceedings before the Board, which were not involved before the Circuit Court; and by several issues involved before the Circuit Court which are not involved here. In part this condition arises because the Board saw fit to include in one proceeding (with conceded propriety), issues arising from three separate and distinct sets of facts, no one set of which bore any relation to any other set, either in time or in factual foundation.

(a) The Issue as to Victor Cane.

The Board issued a complaint alleging that the discharge of one Victor Cane was in violation of Section 8(3) of the National Labor Relations Act (hereinafter styled the Act) (135). After hearing, the Board found that the discharge was *not* in violation of the Act (156, 137). But some of Cane's superiors had held some conversations with him, on two or three occasions, more than two months previously. Utterly ignoring the proven background of long-existing and peaceful union-employer relation (including years of recognition, continuous collective bargaining, and the continuous existence of a written contract of employment between employer and the involved union), and entirely ignoring that such "questioning" is not forbidden by the Act, save where accompanied by other facts from which coercion, etc., may be reasonably inferred, none of which existed here; the Board found that some of the questions asked of Cane, constituted an "unwarranted prying into" union affairs, in violation of the provisions of the Act forbidding coercion, interference and restraint of employees (154, 137).

The Circuit Court found (at page 578):

> "There is nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act."

Upon this evidence the Board entered the same all-inclusive order stated in the identical terms, as that condemned by this court in *N. L. R. B. v. Express Publishing Co.*, 312 U.S. 426.

The Circuit Court struck down that portion of the order entered by the Board, but substituted an order less broad in scope. The legality of that substituted order in the face of the court's finding that petitioner had evidenced no hostility to the purposes of the Act and the inadequacy of the evidence supporting it, is the only remnant of the Cane case, involved in this petition.

Petitioner contends that since there is no evidence that its acts were motivated by any attitude of opposition to the purposes of the Act; since the Circuit Court found that the record contained no evidence of any such attitude; since the record displayed years of compliance with the Act, and years of enjoyment of all its privileges by employees; on the authority of *May Dept. Stores v. N.L.R.B.*, 66 S. Ct. 203; 90 L. Ed. Adv. Op. 131, the court should have made no substitution for the stricken paragraph of the order.

(b) The issue of the Plant Clerks.

Having found no error in the decision of the Circuit Court on this issue, this issue is not involved here.

(c) The cases of Cornforth, Cowger and Donahue.

The Circuit Court found:

> "Likewise, the transfer of Cornforth, Cowger, and Donahue to employment where they would not have access to confidential information was predicated on the good faith contention that clerical employees having access to confidential information of Armour were a part of management and should be classified as employers rather than employees."

These employees were on the personal staff of the General Superintendent of the plant (454, 181, 183, 464). They

are described as his personal representatives in the plant (350). They spent about half their working time in the plant, alongside the regular production workers (187, 257, 237). These employees, with eleven others, constituted the staff which made all time studies; established all job standards for all production employees; constantly checked production performances against standards; and computed all labor costs incurred in the plant (454). And, of course, they knew all foremen's and executives' salaries (225).

Since the knowledge of these confidential facts would be of inestimable value to the Union in its collective bargaining, the Company contended that these fourteen employees were essentially a part of the management of the plant and therefore they were not "employees" within the meaning of the Act (181). The finding of the Board, and of the Circuit Court to the contrary, is questioned here. In essence, we are concerned with the basic right of an employer to withhold from employees who belong to a union, and who may be covered by the Act, confidential facts bearing upon Company policies and operations, which would utterly destroy that *equality* in bargaining position which is stated to be the primary objective of the Act in its first section thereof, if possessed by the Union.

Upon learning that these three employees had affiliated themselves with the Union, the Company advised them that it did "not question the right of any employee to belong to a labor organization"; that they could "belong to a union if you want to"; that it had "no quarrel with labor organizations"; that it was not proposed "to discharge anyone". But their close connection with management was emphasized, and they were definitely told they would be transferred to other duties, if they wished to affiliate with this union, which the Company had long since recognized, with whom it had long held a contract, and with whom it regularly bargained collectively (181).

No immediate answer was requested. The employees were given the chance to talk the matter over confidentially amongst themselves and to think about their decision (182). When the employees' decision became known, and their desire to retain their union connections was established, the transfer was made (147).

This was *not* a transfer from an office job to a plant job. These employees already were engaged in the production division. They were regularly spending "half their time" in the manufacturing areas of the plant, studying, checking and improving the efficiency of the production workers (187, 237, 257). Nor was there any evidence that any difficult or disagreeable jobs were selected for them. There was no loss of seniority involved (250). Because of the terms of the long-standing contract with the union it was necessary that they start at the lowest rate in their new department (447). But having started, promotion for merit was within the discretion of the management. *Rapid promotion* to positions of similar salary was *definitely promised each of them* (191, 241, 242), and they were urged to accept the transfer (445) under these conditions.

Not one of the three reported for work the following day, as they were directed to do. They frankly admitted they "hadn't the slightest idea" of what work they would have been called upon to perform had they reported for work at their new jobs (191, 241). Two days later, each received a registered letter advising them that their jobs were still being held for them and requesting that they report for work (444). They did not acknowledge it. Nor did they ever come to see what kind of work they would be expected to do at their new assignment. And of course, the Company was thereby denied any opportunity to extend to them the promised promotions and elevations in pay.

The petitioner contends that these facts, which are undisputed, afford no evidential support for any finding that these employees were discharged, constructively or otherwise. On the contrary the evidence establishes, and the Board found (147), that the employees quit of their own volition (176, 179, 180, 182, 183). They refused to return to work when summoned two days later. There is not a scintilla of evidence that any one of them were discharged in any sense of the word. The order to reinstate them, is without evidential support. They were never discharged. And in closing, we iterate that there was no evidence of any employer attitude of opposition to the Act. On the contrary, the Circuit Court found that a policy of compliance existed.

The remaining phase of this issue has to do with damages. Assuming these employees had been wrongfully discharged, of course we cannot now know whether any of them suffered damage or not. All *may* have secured employment the following day at wages higher than they were currently earning. But if it shall appear that they did not, petitioner believes, as a matter of law, the maximum liability which could have been imposed, was the difference between their former rates, and the rates which they would have earned, at their new jobs, *including the promised promotions and advancements in pay,* which they failed to receive solely because of their own action.

Their former rates of pay would have been continued but for the provisions of the long-standing union contract. Had these people returned to work, accepted the work assigned, and afforded the employer the chance to give them the promised promotions and advancements in pay, we would have welcomed an order which would free us from the contract, and require the payment of any deficiency in their new rates of pay. But their refusal to accept the positions offered, was wilful and without reason. That refusal denied the employer the right to make them whole voluntarily, at the earliest possible date.

Basically, the question is whether the rule as to mitigation of damages is to apply. The Board's counsel conceded at the hearing that it should (250). To illustrate, employee Cornforth was receiving 62½ cents per hour (190). She was transferred to another temporary position, in the same general division which would have paid her a starting rate of 59 cents per hour (191), with promise of quick promotion to a rate even higher than 62½ cents per hour (191). She utterly refused to accept the transfer, or to investigate the nature of the new work offered (190), or to acknowledge the offer of work and request to report for work written to her, after she quit. She conceded the possibility that she might have been put to work at 65 cents per hour (194). By her voluntary act, the Company was deprived of any opportunity to promote her as it had promised to do. Her act, and her act alone, caused the loss of 59 cents out of her original 62½ cents on the first day following her departure. And only her

act deprived her of making more than 62½ cents per hour within a few weeks.

We believe the order as entered, is an order for *punitive damages,* which is beyond the power of the Board.

THE BASIS FOR JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

1. The statutory provisions believed to sustain the jurisdiction of this court are Section 347 (a) and (b) of Title 28, U.S.C.A.; (quoted in full in Appendix A hereto, page 19 post), and Section 160(e) of Title 29, U.S.C.A., (the material portion of which is also quoted in said Appendix A.)

2. This proceeding involved the interpretation and application of a statute of the United States, viz, substantial portions of Sections 158; and 160(c)(e) of Title 29, U.S.C.A., in the light of Section 151 and particularly of the third paragraph of said Section of said Title. (All are quoted in full in Appendix B, page 20 post).

3. This petition was filed in this court within the time required by the first paragraph of Section 350 of Title 28, U.S.C.A., (quoted in full in Appendix A hereof, page 19 post). The first decision of the Circuit Court was filed November 5, 1945. Supplementary decision on petition of petitioner for rehearing was filed January 8, 1946. Order of the Circuit Court denying petition of the National Labor Relations Board, for further rehearing was entered May 8, 1946.

4. The decisions of this court believed to sustain the jurisdiction of this court are:

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1; 81 L. Ed. 965.

National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469; 86 L. Ed. 348.

Phelps-Dodge Corporation v. National Labor Relations Board, 313 U. S. 177; 85 L. Ed. 1271.

May Dept. Stores v. National Labor Relations Board, 66 S. Ct. 203; 90 L. Ed. Adv. Op. 131.

5. The decision of the Circuit Court here sought to be reviewed appears at pages 517 to 529 of the record filed herewith.

THE QUESTIONS PRESENTED.

1. May isolated actions and words of an employer, publicly known to have recognized, bargained, and contracted with unions for nearly a decade; an employer known as a nationally unionized employer in scores of plants and establishments; an employer who, in the plant involved has recognized the union for nine years, has regularly bargained collectively with that union, whose bargaining has for several years ripened into a written union contract; be judged by the same standards as similar words and acts of another employer, whose tactics, obstructive to union organization and whose union hating, union baiting practices are notorious?

2. What is the effect of an order such as was here entered upon the employer's constitutional guarantee of freedom of speech, when as the Circuit Court finds, that such employer has cooperated to the complete attainment, and continued maintenance of every objective of the Act?

3. Has an employer the right under the Act, in order to maintain that "equality of bargaining power between employers and employees" (appearing to be the fundamental objective stated in Section 1 of the Act), to transfer without penalty employees, known to be union members, from positions in which access is had to confidential information, which, if known to the union, would destroy equality in bargaining power and place the union in a dominant bargaining position, to other similar positions, subject to existing union contract requirements, particularly when promises are made for the rapid promotion of such employees to better paying positions, as fast as conditions and the existing union contract will permit?

4. Are such persons "employees" within the definition of the Act?

5. Where there is no "clear determination" by the Board, and no evidence supporting any such determination of any "attitude of opposition to the purposes of the Act

to protect the rights of employees generally", and where the record shows that "employees generally" of the plant have enjoyed every benefit of the Act for nearly a decade, and still enjoy it; where the Circuit Court finds "there is nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act", is any decree necessary, enjoining Company actions clearly not motivated by any attitude of opposition to the Act?

6. In the absence of a scintilla of evidence, that the newly assigned work was more arduous, more difficult, in less pleasant surroundings, or otherwise materially different from the former position in nature, can an employee who voluntarily quits the service rather than accept the transfer, with promised promotion and advancement in pay, and who ignores a subsequent recall to work, be said to be "constructively discharged" and therefore discriminated against in the matter of employment?

7. (A corollary to No. 6). If such a transfer and refusal be a discharge, is the employer entitled to credit for wages which he could and would have paid the affected employees, had they accepted and performed the proffered equal employment, pending the litigation of their claim; or may they wilfully augment damages by refusing to accept work until they find a position of their own choosing?

SPECIAL AND IMPORTANT REASONS FOR THE REVIEW OF THE DECISION.

(a) Conflict with existing decision of the Supreme and Circuit Courts.

1. The decision of the Circuit Court is in conflict with the decision of this Court in *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U.S. 469; 86 L. Ed. 348, in that the Board, and the Circuit Court failed to consider the evidence establishing long years of employer-union cooperation, recognition, collective bargaining, ripening into contract after contract of employment. On the contrary, the Court seemed to regard certain acts and statements of the employer, as though appearing before a background of union hostility, union baiting, and a long record of hostility

to plant organization. Yet the Circuit Court found the record utterly void of any evidence opposition to the purposes of the Act.

2. The decision of the Circuit Court is in conflict with the decision of this court in *May Dept. Stores v. National Labor Relations Board,* 66 S. Ct. 203; 90 L. Ed. Adv. Op. 131. There this court held that Company actions need not be enjoined, even though technically in violation of the Act "without a clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally", and the injunction should be limited to acts motivated by such oppositive attitude.

Here the Circuit Court found that *not one act involved was motivated by any evidenced hostility* to the purposes of the Act; and "There is nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act". That finding is supported by undisputed evidence that employees at this plant have enjoyed all the rights of the Act for nearly ten years. In compliance with that decision and with its own findings, the court should have refused to enter a decree against making inquiry of its employees with respect to their concerted activities, etc.

3. The decision of the Circuit Court is in conflict with the decision of the Circuit Courts of the Eighth Circuit and of the District of Columbia in *Montgomery Ward v. National Labor Relations Board,* 115 Fed. (2d) 700, and in *Press Co. Inc. v. National Labor Relations Board,* 118 Fed. (2d) 937, wherein the courts have held that surveillance was not prohibited by law, unless other acts of coercion, interference, etc., accompanied it. No such other acts existed here.

4. The decision of the Circuit Court is at variance with that of the Circuit Court for the Third Circuit in *National Labor Relations Board v. Botany Worsted Mills,* 106 Fed. (2d) 263, in that the court of the Third Circuit held that the mere inquiry as to the union status of an employee, and as to his solicitation for membership, did not constitute substantial evidence required by the Act as a basis for violation thereof. Such an inquiry is the sole foundation for the Board's order here.

5. The decision of the Circuit Court is in conflict with the decision of the Circuit Court of the Fifth Circuit, in *National Labor Relations Board v. East Texas Motor Freight Lines,* 140 Fed. (2d) 404, wherein that court held it to be "clearly within the rights of a Company to ascertain whether its employees had organized a union", and within the employer's rights to "express his individual views with reference to unions" etc., as long as no influence or intimidation existed. Here, every statement relied on by the Board was preceded by a statement to the employee that he was entirely free to join a union if he wished.

6. The decision of the Circuit Court is in conflict with the decision of the Circuit Court of the Sixth Circuit in *National Labor Relations Board v. Brown-Brockemeyer Co.,* 143 Fed. (2d) 537. There, the court gave consideration in denying enforcement of the Board's order, to the fact that the union was the certified exclusive bargaining agent of the employees, and that a contract between the union and the Company was in effect. The Board here gives no consideration or makes no mention of that important fact.

7. The decision of the Circuit Court is in conflict with the decision of the Court of Appeals for the District of Columbia in *The Press Co. v. National Labor Relations Board,* 118 Fed. (2d) 937, wherein that court held that mere evidence of a "material alteration in duties" after which the employee quit, did not warrant the conclusion of discharge. It is also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *National Labor Relations Board v. Waples-Platter Co.,* 140 Fed. (2d) 228, wherein the court sustained a general finding of interference, but set aside the order insofar as it ordered back payment to two employees, one transferred from one job to a different job, and the other from one headquarters to another, who quit rather than accept the transfers.

8. The decision of the Circuit Court is in conflict with the decision of this court in *Phelps-Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, in that the Circuit Court here holds the employer liable for damages, wilfully and unnecessarily incurred by the employee, even in the face of its own finding that "the transfer of Cornforth,

Cowger and Donahue to employment where they would not have access to confidential information was predicated upon the good faith contention that clerical employees having access to confidential information of Armour were a part of management * * *," and in face of the finding that Armour need not restore the employees to positions identical in the degree of confidential information gained therefrom.

(b) Important questions of Federal Law which have not been, but should be, settled by this Court.

1. Insofar as we can ascertain, there is no decision of this court which establishes the status of an employer under the Act, *after all of the objectives of the Act have been attained,* and after its employees generally throughout the Nation are known to have enjoyed for many years, every right guaranteed them by Section 7 of the Act; and when such a situation is shown to exist currently. The decisions of the Board, and of the courts thus far, have usually involved statements and actions of employers, made during the organization period when employees were applying themselves to *attain* the objectives of the Act. As a result the pattern of the decisions divide into two segments—one, where the employer's acts and declarations appear to be a part of an existing pattern of union hostility, of opposition to organization of employees, and of demonstrated intent to thwart the purposes of the Act;—the other where no such background exists.

In this case, the Circuit Court said: (Emphasis supplied)

> "* * * we entertain no doubt that as to the both" (incidents) "Armour acted in good faith and did not intend to violate the * * Act. There is *nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act.*"

The Court might well have recited the evidence showing union recognition at this plant since 1937, and the continu-

ing enjoyment of all of the benefits of the Act by the great bulk of its employees, ever since that date, not only at Kansas City but throughout the Nation (112). It might have pointed out the ten year record of compliance with Board orders during which Armour appeared in but one enforcement proceeding in the Circuit Courts. We shall advert in greater detail to this phase, in our accompanying brief. Suffice it to say that the vast majority of the employees at this plant have enjoyed every benefit conferred upon them by the Act for nearly ten years, and still enjoy those benefits

The first important and undecided question is one which will appear with recurring frequency as time passes, and as more and more employers can establish a decade of compliance with the Act, and of full enjoyment of all its benefits by its employees.

Simply stated it is this:

Where it appears from evidence of almost complete and nationwide unionization of the employer's plants for many years, and from evidence of the notorious enjoyment by the great bulk of employees for years of union right given them under the Act, what acts or statements of such an employer will constitute substantial evidence of prohibitive "interference, restrain or coercion" of an employee by such an employer?

In the decision of this court in *May Dept. Stores v. National L.R.B.*, 66 S. Ct. 203; 90 L. Ed. Adv. Op. 131, at page 141, this court decided that a court need *not* enjoin Company actions, where the Board has not made a "clear determination" of the employer's "attitude of opposition to the purposes of the Act to protect the rights of employees generally."

The Board made no such finding of any attitude of opposition here. On the contrary the court found that the record contains "nothing * * to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act". On such a record, may the Board go as far, in *inferring* coercion, etc., as it may, where there is compelling proof that "employees generally" are, and for years have

been denied every privilege extended them by Section 7 of the Act, by continuing employer hostility?

In the case at bar, the entire basis for the Board's finding was the employer's statement to an employee to this effect:

> "We know you have joined the union with whom we have bargained for years. We have not the slightest objection to your joining, or to anybody else joining. But tell us if you will, what reasons induced you to join, and what other employees in your group have also joined?"

Waiving the assurance appearing in the opening phrase, the new question is whether the coercion, etc., which might be inferred, were the question asked during the organization period, by an employer whose other acts evidenced some degree of union hostility, may as a matter of law, be inferred when the same words came from the lips of an employer who has notoriously recognized and extended to the great bulk of his employees, every benefit bestowed upon them by the Act, and is currently extending those benefits.

Stated in another way, the question is whether the freedom of speech of an employer whose employees generally throughout the Nation notoriously enjoy all the benefits of the Act, is restricted by the Act, to the same extent as the restriction imposed upon another employer not so situated.

There is a second novel, important and undecided question. If the entire first section of the Act be carefully read, we think the primary objective of the Act is stated to be the interruption of commerce occasioned by *inequality of bargaining position* of employers and employees, each as a group. The declared objective in the third paragraph is "restoring *equality* of bargaining power."

No decision of this court establishes the employer's right, or the Board's power, where it appears that the confidential secretary to the President or Secretary of the Company, has become a member of the Union, with whom the Company must bargain. No decision decides whether such an employee is covered by the Act at all. No decision

affirms or denies the right of the employer to take any steps to restore the equality of bargaining in position which would be destroyed if the Union had complete access to the most confidential phases of the management of the Company.

Having commanded equalization, and no more, the Congress has specified in Section 7, exactly the rights which must be vested in employees, in order to bring about the objective of the Act, viz, "equality of bargaining power."

It has not prohibited employer coercion, restraint or interference generally, but only prohibited such practices when they affect the rights of employees named in Section 7.

It has limited the power of the Board, to direct affirmative action by the employer where necessary to effectuate the declared policies. One of those policies is the creation of *equality* of bargaining power between employer and employees. Therefore the power of the Board is broad, when the affirmative action is necessary to produce that *"equality"*; it is non-existent when such *equality* already exists. The Board may not destroy that equality by ordering an employer to place the employees in a bargaining position superior to his own. Such action is *not* "necessary to effectuate the policy" of the Act, viz, *"equality* of bargaining power".

Congressional use of the word "equality" necessarily *bestows something upon the employer as well as employees,* of which he may not be deprived by distortionary interpretation of other sections of the Act.

Of course there exists a corollary to the first new question previously described. When equality of bargaining power already exists by the extension to employees generally, over a period of years, of all of the rights named in Section 7, from whence springs the power of the Board to compel the employer to go further?

If the parties are to have equality of bargaining power, of necessity there must be some information possessed by each party, of which the other party is ignorant. An employer who knows of wholesale loss of membership by the union has a bargaining advantage. A union which knows of

pending negotiations for a large and lucrative production contract, which a strike would seriously affect or possibly destroy, has a bargaining advantage.

An even greater possibility of advantage exists when the union knows all the job standards and production costs of the employer. And where as here, the same union, represents the employees of practically all employer's competitors, such knowledge can be serious. May we illustrate, in order to establish the extreme importance of the question to be stated, not only to us, but to all American industry.

The union approaches this employer and says, "On job number 100 you are maintaining a job standard of 12 pieces per hour. That is too high. Swift maintains 10, Cudahy 9, and Wilson 8. You can easily afford the added cost of reducing the standard. Your unit costs are ten cents, Swift's are eleven cents, Cudahy's twelve cents and Wilson's thirteen cents.

Perhaps the answer is that our standard is based upon the use of expensive power saws, while our competitors continue to do the work with hand saws. Perhaps the cost differential is due to different allocations of overhead costs by the competing companies. There are scores of answers to the union's contention *if* we were as free as the union, to investigate the cost sheets and standard making processes of our competitors. Obviously, we are not.

Because of the tremendous *in*equality in bargaining power which would result if all bargaining involving production costs or job standards was conducted, with the union possessed of the standards and costs existing in every company in the industry, while we were deprived of any knowledge of the distinguishing methods, and factors entering into these costs, *we have assumed that we had the right, in order to maintain equality in our bargaining position, to withhold from any union member any and all information of this type.*

We have not brought here, the decision of the Board or the court affecting plant clerks, for the reason that we shall be able by the redistribution of duties of the foreman and his clerk, to remove the accessibility of a union plant clerk, to information which, if possessed by the union, would

materially affect our bargaining position. But as to the Industrial engineers, we cannot give them some of the duties now exercised by Mr. Campbell, and reassign their duties to him. The mere fact that fifteen persons are required to apply and keep up to date this confidential information clearly demonstrates the impracticability of such a change.

Therefore, in the case at bar, being unable to transfer the duties, we transferred the employees to other duties, replacing them with other persons who were not under oath to aid and abet the union objectives in every possible way.

With this background, we may state the novel question:

May an employer transfer an employee from one position to a *similar position* for the sole purpose of making inaccessible to such employee information which, if had by the union, would seriously affect if not utterly destroy any semblance of equality in bargaining power?

Strangely, the court below grants our right to do this, but, (we think inconsistently), it has ordered back pay to employees as to whom we merely exercised this right.

CONCLUSION.

In the interest of brevity, petitioner has not herein referred to the evidence supporting the factual assertions herein made, but has only included sufficient record references to establish that the issue herein stated in fact exists. Nor has petitioner attempted to set forth all of the decisions of this court or of the courts of the other circuits appearing to be in conflict with the decision of the Circuit Court for which review is here sought. Nor has petitioner sought to set forth all of the novel collateral and related questions which spring from the two novel and undecided basic questions herein set forth. Enlargements upon the points herein stated are made in the supporting brief filed herewith.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review

and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decision and order of the United States Circuit Court of Appeals for the Tenth Circuit, be reversed by this Honorable Court, in the respects hereinbefore alleged to be erroneous, and that your Petitioner have such other and further relief in the premises as to this Honorable Court shall seem just and equitable.

Most respectfully submitted,

CHAS. J. FAULKNER,
FREDERICK R. BAIRD,
PAUL E. BLANCHARD,
4301 South Racine Avenue,
Chicago 9, Illinois,
and
HUFFMAN, SUTLIFF & ROGERS,
Ernest and Cranmer Building,
Denver, Colorado,
Attorneys for Petitioner,
ARMOUR AND COMPANY.

Dated at Chicago, Illinois,
July 18, 1946.

APPENDIX A.

(Statutes bestowing jurisdiction)

SECTION 347, TITLE 28, U.S.C.A. (page 359):

"Sec. 347. (Judicial Code, Section 240, amended.) Certiorari to circuit courts of appeal and court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

SECTION 160(e) TITLE 29 U.S.C.A. (page 239):

"* * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28."

SECTION 350, TITLE 28, U.S.C.A. (page 376):

"Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted

where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."

APPENDIX B.

(Statutes to be interpreted and applied)

SECTIONS 151, 158 and 160(e) (in part), TITLE 29, U.S.C.A. (pages 84-85, 135): (All emphasis supplied)

SECTION 151. FINDINGS AND DECLARATION OF POLICY.

"* * * The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and *by restoring equality of bargaining power between employers and employees.*"

* * * * *

SECTION 158. UNFAIR LABOR PRACTICES BY EMPLOYER DEFINED.

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees *in the exercise* of the rights guaranteed in section 157 of this title."

* * * * *

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership* in any labor organization: * * *."

* * * * *

SECTION 160 (c)

"* * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

* * * * *

SECTION 160 (e)

"* * * The findings of the Board as to the facts, *if supported by evidence*, shall be conclusive."

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No.....

ARMOUR AND COMPANY, a Corporation, PETITIONER,

against

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

FOREWORD.

We have exercised every effort to comply with the rules of the court requiring that briefs be concise. We have here a proceeding wherein two separate cases, unrelated in point of time, in issues or in substance are presented in a single proceeding. The separate cases were consolidated (with unquestioned propriety) by the board in a single proceeding. As a result, we must, in effect, combine two petitions for certiorari, supported by a combined brief.

All emphasis in quotations are by the author. All parenthetical numerical references are to the pages of the record filed herewith.

THE STATUTES INVOLVED.

The following statutes are involved:

Sections 151, 158, and 160(e) of Title 29, U.S.C.A. The involved portions thereof are fully set forth as Appendix B to the Petition for Certiorari filed concurrently herewith.

OPINION OF THE COURT BELOW.

The opinion of the National Labor Relations Board was filed February 2, 1944. It is reported in 54 N.L.R.B. 1005 and appears at pages 136-141 of the Transcript of Record filed herewith.

The opinion of the Circuit Court for the Tenth Circuit was filed November 5, 1945. Supplemental opinion on petition of the Company for rehearing was filed January 8, 1946. An order denying a later petition of the Board for rehearing was filed on May 9, 1946. The two opinions are reported at 154 Fed. (2d) (Adv. Op.) 570 and are set forth at pages 517 and 558 of the Transcript of Record filed herewith.

GROUNDS FOR JURISDICTION.

The grounds for jurisdiction are fully set forth at pages 7-8 of the Petition filed herewith. Briefly the case involves the interpretation and application of Sections 151, 158 and 160(c) and (e) of an Act of Congress, viz, the National Labor Relations Act, U.S.C.A. Title 29, and of a determination of the scope of petitioner's liabilities and of the Board's powers thereunder.

STATEMENT OF THE CASE.

Because of the consolidation of proceedings by the Board, there are two unrelated cases to be stated, each involving the application and interpretation of portions of the Act. In one, employees and executives in the "office side" of the Company's business are involved. In the other, the "production" or "plant" side is concerned.

(1) THE CASE OF VICTOR CANE.

Victor Cane was an experienced salesman having a "territory" near Kansas City in which he sold the Company's products prior to the war. The curtailment of meat distribution during the war caused the Company to consolidate three territories, displace some of the salesmen, bring them into Kansas City, place them at clerical jobs while holding them for replacement on other territories as expected vacancies appeared (152, 202, 269).

While waiting for a new territory and performing casual clerical work in the Kansas City office, Cane began driving a cab during his off-hours to augment his income (199). A vacancy in a sales territory occurred which was offered to Cane, with a five dollar salary increase, and refused (154). Later another territory was offered him, with a ten dollar salary increase which Cane also refused (203). Cane's reasons were entirely personal. He objected to being away from his parents, and his wife objected to living in a small town (219). He wished to retain his earnings as a cab driver (212) and he advanced similar reasons all entirely personal in nature (213-214).

After three offers of positions at his regular job as salesman, each at increased salaries; and after three refusals thereof by Cane (216) he was paid considerable advance salary and left the employment on August 10, 1943. The Board found his discharge wholly justified.

During the period before Cane left, the Union which for several years had had exclusive bargaining rights for some 3000 employees in the plant, sought to extend the coverage of its representation by including additional employees on the plant side. Cane, and other office employees also desired to be placed within the group represented by this Union. Cane's superiors had several conversations with him as to the reasons underlying his desire. The Board adverted to these conversations (which Cane had with his superiors before June 9, 1943 (197), more than two months before his severance from service) and found that those conversations constituted "coercion, interference and restraint". Therefore the subsequent and repeated offers of

jobs to Cane, (the only witness who described the remarks complained of), the repeated salary increases thereafter offered, and the general spirit displayed toward Cane by his superiors during the two months following the questioned conversations, form an important part of the background of the Company's attitude toward unionization of its employees.

The incidents directly involved occurred about June 9, 1943. While Cane's entire testimony should be read in order to establish the friendly and harmless nature of the conversations and questions involved, pages 199-201 of the Transcript of Record are generally indicative of the nature of the conversations. The following statement is particularly indicative of the attitude of the Company. Speaking of every superior with whom he talked, Cane said:

> "*Everyone of them said, we have no objection whatsoever to you having a union,* but every time we would have a meeting, they could call somebody in the next day or two afterwards and talk to them about what had gone on at the union meeting." (Tr. R. 216.)

There is not a scintilla of evidence establishing any other conversation with "somebody" who was "called in" after union meetings. No other witness testified to, nor is there any evidence that Cane had the slightest knowledge of, what was said to any of these "somebodys" who were "called in", nor are we told who was "called in".

In the argument which follows we will establish:

1. That the conversations, standing alone, and without background, are innocent and harmless inquiries coming within those described by the Circuit Court of the Fifth Circuit in *N. L. R. B. v. East Texas Motor Freight Lines,* 140 Fed. (2d) 404 at page 405 as follows:

> "It was *clearly within the rights of Motor Lines,* through its manager, to *ascertain whether its employees had organized a union;* it was further within the rights of such officer to *express his* individual views with reference to unions and his opinions of unions with any of the employees, as this involved freedom of speech, * * *."

2. That even secret espionage is not *per se* forbidden by the Act. By the great weight of authority, it is merely one evidential fact, which, when accompanied by *other* evidence of Company opposition to the Act, may constitute support for a finding of coercion, interference or restraint.

3. That when the conversations are viewed against the background of years of continuing recognition, of years of bargaining and contracting with the very union involved; of the almost total absence of any litigation wherein this Company appeared in opposition to any order of the Board; of the scarcity of cases before the Board in which this Company was even accused of hostility to any purpose of the Act; and of the fact that its plants throughout the Nation are, and for years have been operating under contracts with voluntarily recognized or certified unions (112); when the treatment of Cane for the sixty days following the conversations is considered, his retention on the payroll at unnecessary work; the repeated offers of work at his regular job at increases in salary; the evidently supported finding of the Circuit Court precludes any possibility of *inferring* coercion, interference or restraint, as a matter of law. We refer to the Circuit Court's finding at page 578 of its opinion on rehearing:

> "There is nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act."

(2) THE CASES OF CORNFORTH, COWGER AND DONAHUE.

These cases arise on the "plant" or "production" side of the Company's business, and are separated in point of time, from the events underlying the previous case, by from two to three months. The employees named, with eleven others, made up the industrial engineering element of the staff of the General Plant Superintendent (454, 181, 183, 464). Collectively, they were responsible for establishing the production standards of every job in the plant; for maintaining efficiency of the production forces; checking the production forces and methods against the possibility of meeting higher standards, increased production and lowered

costs; supervising the meeting of existing job standards, and the ascertainment and removal of causes interfering with production up to the standards they had established. And superimposed upon these duties was the continuing computation of unit costs of production in every department in the plant.

Because of the highly cofidential nature of the work performed, and because of the well known and continuing diversity of objectives of these production employees as contrasted to manufacturing production employees# this Company has always regarded these persons as not only "acting in the interest of an employer" but also as acting in an interest *entirely diverse from the interests of other production employees,* and therefore regarded them as not subject to the Act.

Entirely without inquiry on the part of the General Superintendent (461) information reached him about August 9, 1943, that the members of his staff who performed his industrial engineering for him, were considering affiliating themselves with the same union which, since 1937, had been the bargaining agent for all the other production and maintenance employees in the plant. (The union was at that time seeking to expand the scope of its representation.)

Accordingly, Mr. Campbell called these employees to his office, 14 or 15 of them,* and read them the prepared state-

---

#The term "production employees" as frequently appearing in this record deserves especial note. It is not equivalent to "slaughtering employees" or "manufacturing employees". At Kansas City (as at all other Armour plants), there is a major division of all employees into "office" employees and "production" employees. "Production" employees are those connected with the *production* and loading (as distinguished from sale, transportation accounting, etc.) of goods. The classification includes stenographers, comptometer operators, all types of clerical workers, as well as those employees who actually slaughter and dress the animals, pack the product, and load the outgoing trucks or railroad cars.

Nor is the phrase "office employees" used in any geographical sense. It describes employees engaged in or connected with activities other than actual production and loading, such as selling, transporting, purchasing of supplies, accounting, financing, and all other processes other than production. At Kansas City Mr. Campbell, the ranking production employee on the ground, and some of his personal aides and supervisory staffs have their desks in the same building, as do selling, transportation, accounting and "office" employees.

*The members constituting this department are said to be 14 and 15. The difference depends on whether Asst. Supt. Anderson is included.

ment appearing in full at pages 180-182 of the Transcript of Record. While the entire statement should be read, the following extracts highlighted the position taken by Mr. Campbell. (Emphasis supplied.)

> "We are *not questioning the right of any employee to belong to a labor organization. That right is protected by law. You can belong to a union if you want to,* but you can not belong to a union and at the same time continue as a part of the management, in one of these positions which are confidential and entirely out of any bargaining unit."
>
> * * * * *
>
> "We wish to impress upon you too, that the *Company has no quarrel with labor organization,* * * *."
>
> * * * * *
>
> "We *do not propose to discharge anyone,* and you will be offered employment in the production group and placed in a position within the bargaining unit as established for production work. We will not permit management employees in the Industrial Engineering Group to become members of a labor organization, and at the same time retain their present status as management representatives." (Tr. R. 181.)

After discussing Mr. Campbell's statement in his absence, and among themselves for an hour and a half, the employees informed Mr. Campbell they would "stay on our jobs and not join the labor organization." (179, 230.)

Two weeks later (180) Mr. Campbell learned that the three employees here involved were continuing their union affiliation. He immediately called them in, and advised them to report to the employment manager the following morning for assignment to new duties. The answer of the three to these instructions was a positive declination of the transfer. This is described by Mr. Cowger in these terms:

> "* * * it was merely telling him" (Campbell) * * * that *we wouldn't take a job in the plant.*" (233.)

Mrs. Cornforth described their altercation as follows:

"Q. Well, you very clearly were given the alternative of joining the production group, were you not?

A. Yes, but *none of us wanted that.*

Q. But I mean, the lack of alternative was from your desire.

A. That is right.

Q. Not from anything Mr. Campbell did?

A. That is right." (Tr. page 182-183.)

It is undisputed that the severance from the service was the free and voluntary act of the employees. These three persons, after considering the offer, in Mr. Cowger's words, "quit" (240).

The case does not fall within the category of simulated transfers, such as where a slightly built bookkeeper is "transferred" to a job requiring the handling of 500 pound lard tierces, or where a dainty office typist is "transferred" to a job of cleaning animal intestines for sausage casings. The dividing line between plant employees, under Superintendent Campbell, and office employees under Office Manager Thompson, is clear cut (62, 63). These employees were already in the plant division, being part of Mr. Campbell's staff. And it is conceded that for half their time or more, when on duty, they were working alongside plant production employees (Mrs. Cornforth described it as "half the time" (187). Mr. Cowger stated it to be "every other day" (237). Mr. Donahue "every day" (257)). Therefore, there was not the slightest change in jurisdictional grouping, nor was there any material change in the place of employment.

Each employee was fully advised that *their new jobs were only temporary,* and would be followed by *rapid promotion and advancement in pay.* There were many clerical jobs in the plant which paid as much or more, than these three employees were getting. Mrs. Cornforth was receiving 62½ cents per hour when she was transferred (190). Her transfer was to a temporary job paying 59 cents per hour (190) with rapid promotion promised (191). The record shows women's clerical jobs in the plant paying 64 cents

per hour and higher (447, 194) and men's clerical jobs paying up to $45 per week (84). Such wages exceeded that drawn either by Cowger or Donahue (241, 249). There was no question as to Mr. Campbell's *ability* to promote these employees to positions paying as much as, or more than, they were receiving when the transfer took place, *had they afforded him the opportunity to do so.*

Nor can any material change in conditions of employment be assumed from the proposed transfer. Mrs. Cornforth was a high school graduate (167). That was an educational requirement for numerous other positions on the production payroll in the plant (65, 71). Many production employees had the same working hours as office employees and different hours than the slaughtering gangs (63, 71). The type of clothing worn by many production employees was identical in type to that worn by office employees (71). Silk dresses worn at work by female plant clerical production workers were not unusual (53).

Working conditions, such as lighting, heating, freedom from factory noises in many production positions, and segregation from slaughtering gangs, were identical to those enjoyed by office employees (54, 72). Persons regularly employed as clerks on the office payroll are frequently assigned as temporary replacements for absent production clerical workers on the production payroll (71). These and many other facts indicate that no loss of face, dignity, or position resulted from the transfer which was attempted.

The three employees not only flatly refused to accept the transfer (190, 233) or report for work as directed, but they utterly *failed to investigate or ascertain the nature of the work they would be expected to do in their new positions.* Mrs. Cornforth said:

> "Q. Well, do you know what kind of a job they had ready for you the following morning, the 18th?
>
> A. No, but I knew it would be in the plant. I knew it would be out there.
>
> Q. Then, so far—
>
> A. *I hadn't the slightest idea what the job might be.*" (Tr. 190.)

Cowger, who was told he would probably start to work temporarily in the box house, testified to the same effect:

> "Q. Your answer is then, that you *did not make any investigation whether it was hard work, clean work, dirty work, easy work, or what.*
>
> A. *No, not that—I didn't make any investigation of that.*" (Tr. 241.)

Not only did Mr. Campbell urge them to accept the transfer (445) but he definitely advised them that their starting jobs and rates of pay would be *only temporary,* and they would be *rapidly promoted and advanced in pay* (191, 241-242, 445).

Three days later, each of these employees received a registered letter from Mr. Campbell requesting that the employees report for work, at the positions being held open (191, 240, 444). The request was ignored.

In the ensuing argument we will show:

1. That fairly construing the Act, and giving effect to the objectives expressed in Section 1 thereof, the Board's power ceases when "equality of bargaining power" is attained by full enjoyment by employees of every right guaranteed by Section 7; and that the Board is without power to *destroy equality* of bargaining power, by including as "employees" under the Act, persons possessing confidential information which would be of inestimable value to the union, once access thereto was obtained by accepting possessors of such information into membership.

2. Regardless of whether these persons were "employees" and beneficiaries of the Act or not, the Board is without power to compel an employer to refrain from reassignment of employees to other duties, or reallocation of responsibilities to other employees, not eligible to union membership and not covered by the Act, where no punitive factor is connected with such reassignment, and no background of opposition to the Act appears.

3. That, as a matter of law, it is not necessary to effectuate the policies of the Act, to require an employer to make restitution to an employee who was never discharged,

but who voluntarily left the service rather than accept the task assigned, particularly where, as the Circiut Court found, "the transfer" of these employees "to employment where they would not have access to confidential information was *predicated on the good faith contention that clerical employees having access to confidential information of Armour were a part of management and should be classified as employers rather than employees.*"

4. That the duty rests upon any employee even if wrongfully transferred to other similar duties because of union activity, to mitigate the damages resulting by accepting the proffered employment while his status, and the equities of his claim are being determined.

SPECIFICATION OF ERRORS.

1. Having found that every act of the Company here involved was "in good faith"; and that the Company "did not intend to violate the National Labor Relations Act"; and that "There is nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act", the Circuit Court erred in failing to set aside Section 1(c) of the order of the Board (Tr. 140) and in failing to make the corrections thereby required in Section 2(d) thereof.

2. The Circuit Court erred in failing to follow the principles enunciated by this Court in *N. L. R. B. v. Virginia Electric & Power Co.,* 314 U. S. 469, 86 L. Ed. 348 at pages 479 and 355 respectively, to the effect that isolated acts and statements of a company may not be considered apart from a consideration of the "whole course of conduct" of the employer, and that such "whole course of conduct must demonstrate an objective which is forbidden by the Act; and in failing to remand the case to the Board for further consideration of such questions.

3. Having found the general attitude of the Company to be entirely cooperative with the purposes of the Act, the Circuit Court erred in holding that Section 1(c) as found by the Board, and as modified by the Court, was supported by substantial evidence, or that any such order was necessary to effectuate the policies of the Act.

4. The Circuit Court erred in failing to concur with the decision of the Circuit Court of the Fifth Circuit in *N. L. R. B. v. East Texas Motor Freight Lines,* 140 Fed. (2d) 404, and in failing to hold that the statements made to, and questions asked of Victor Cane, by his superiors, two months before his departure from the service were "clearly within the rights" of this Company, and of its officers, "to ascertain whether its employees had organized a union", and "to express individual views", particularly in view of the court's finding that there was "nothing in the record to justify the conclusion that Armour entertains any attitude of opposition to the purposes of the Act." By its holding, under such circumstances the court imposed restrictions upon the freedom of speech of the Company and of its officers, forbidden by the First Amendment to the Constitution of the United States.

5. The Circuit Court erred in finding that there was substantial, or any evidence, supporting the factual finding of the Board, appearing on page 154 of the Transcript of Record, reading as follows:

> "The questioning of employees concerning the petition by respondent's supervisors and officers, and Thompson's conduct in scrutinizing the petition and the names of the employees thereon, signalized an unwarranted prying by management into the organizational activities of its employees, and constituted interference, restraint, and coercion within the meaning of the Act."

Under the great weight of authority, such "prying" etc., is not *per se* a violation of the Act, and, standing alone, cannot constitute coercion, interference or restraint, unless accompanied by other acts or statements warranting the same conclusion. Having found that there was "nothing of record" indicating any oppositive position to the objectives of the Act on the part of the Company, the court erred in failing to hold that the factual finding quoted in the preceding specification of error, standing alone and unsupported, did not constitute coercion, interference or restraint, as a matter of law.

6. The court erred in finding that there was substantial evidence, or any evidence, supporting the factual finding of the Board (151-152) that the termination of the employment of employees Cornforth, Cowger or Donahue, was a discharge of such employees prohibited by the Act; and in failing to set aside Paragraphs 1(b), 2(b) and 2(c) of the Board's order (Tr. 140-141) as unsupported by findings of fact or as supported by substantial evidence.

7. Having found that the Company need not restore employees Cornforth, Cowger and Donahue to the *same confidential* positions previously held by them, but is required only to restore them to positions "substantially equivalent * * * as to wages*, character of work, hours, and other terms and conditions of employment," the court erred in finding that the undisputed evidence built to establish that the Company had already offered to do exactly that, and that the employees involved had refused to accept the offered equivalent employment.

8. The court erred in holding that the factual finding of the Board, (to the effect that the transfer of the employees to temporary positions, with *promises of early promotion and advancement in pay)* "constituted interference, restraint and coercion", was supported by substantial evidence.

9. The court erred in holding, contrary to the decision of this court in *Phelps-Dodge Corp. vs. N.L.R.B.*, 313 U. S. 177, that these employees were under no duty to mitigate any damages they might have suffered, to the best of their ability, by accepting the work offered them (in the absence of any proof that it was degrading, over-arduous, or unpleasant), and continuing to accept it pending the disposition of their claim of coercion, etc.; and in failing to hold that the maximum damage for which the employer could be liable, under the circumstances here shown, was the difference between the wages they would have earned at their former jobs, and those which would have been earned at their new

---

*The record is undisputed that the only reason Armour did not continue the same wages for these employees in their new positions, was a contractual obligation with the Union (447) to start new employees in any department at minimum wages.

positions, with due consideration to the promised promotions and advancements in pay.

ARGUMENT.

As in former instances, and because there is involved two unrelated cases, each involving different facts and different sections of the Act, separate discussions of these cases must be made.

PART I.

The Case of Victor Cane and of the Alleged "Prying" into Union Affairs.

Description of the Finding and Order Assailed.

While the Board dismissed all charges named in the complaint concerning this employee, it made the following finding as to certain conversations had between Cane and his superiors, more than two months before he left the service (197, 196) (after refusing three offers of employment at his regular job, at increased rates of pay (211, 212)).

> "The questioning of employees concerning the petition by respondent's supervisors and officers, and Thompson's conduct in scrutinizing the petition and the names of the employees thereon, signalized an unwarranted prying by management into the organizational activities of its employees, and constituted interference, restraint, and coercion within the meaning of the Act." (Tr. R. 154.)

Upon the basis of that finding, it entered an order containing Par. 1(c) requiring petitioner to cease and desist from:

> "(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." (Tr. R. 140.)

The Action of the Court Below.

This is verbatim, the language condemned by this Court in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426. On the authority of that decision the Circuit Court struck down the above quoted paragraph of the order, and substituted a paragraph reading:

> "1. (c) from making inquiry of its employees with respect to their concerted activities for the purpose of collective bargaining or other mutual aid or protection." (154 Fed. (2d) Adv. Op. at page 578.)

Conditions to be Proven.

We shall attempt to show, *seriatim,*

1. That the finding made by the court that this petitioner in all respects acted in good faith, and that the record justified *no* conclusion that Armour entertained any attitude of opposition to the Act, in the light of the decisions of this court in *May Dept. Stores v. N.L.R.B..,* 66 S. Ct. 203; 90 L. Ed. (Adv. Op.) 131, and in *N.L.R.B. v. Virginia Electric & Power Co.,* 314 U.S. 469; 86 L. Ed. 348, made the entry of any such order as the court suggests, unwarranted as a matter of law.

2. That the finding of the Board, that the acts of the Company's officers referred to, signalized an "unwarranted prying by management into the organizational activities of its employees" is not supported by anything resembling substantial evidence of coercion, interference or restraint, prohibited by the Act.

(a) "prying into" organization activities is not an unfair labor practice *per se,* nor prohibited by the Act, unless accompanied by other acts or words, which, in the aggregate warrant a conclusion of coercion, etc.

(b) There are here no such accompanying acts and the *Circuit Court so found,* with great evidential support.

(c) The record is devoid of any "clear determination" (or of any evidence supporting any such determination) of any "attitude of opposition

to the purposes of the Act to protect the rights of employees generally" on the part of Armour. Unless the acts complained of are determined by the Board to be "so motivated" then "the decree need not enjoin the Company actions" *(May Dept. Stores v. N.L.R.B.,* 66 S. Ct. 203; 90 L. Ed. Adv. Op. 131, at 141). On the contrary the Circuit Court found that there was "nothing in the record to justify the conclusions that Armour entertains an attitude of opposition to the purposes of the Act". 154 Fed. (2d) Adv. Op. 578. The record completely supports that finding.

THE FACTUALLY SUPPORTED FINDING OF THE CIRCUIT COURT THAT THE RECORD WARRANTED NO CONCLUSION THAT ARMOUR ENTERTAINED ANY SEMBLANCE OF HOSTILITY TO THE PURPOSES OF THE ACT REQUIRES THE COMPLETE ELIMINATION OF PARAGRAPH 1(c) OF THE BOARD'S ORDER.

From the inception of administrative and judicial consideration of alleged violations of the Act, (and particularly of alleged violation in the nature of coercion, interference or restraint) the Board and the courts have been confronted with borderline cases, wherein an employer's acts, or statement might or might not be coercive, dependent upon the meaning which would be ordinarily ascribed to it, in the light of the circumstances and conditions surrounding it.

The importance of proper consideration of this background appeared in one of the first cases in which this court refused to sustain outright, an order of the Board, viz, *N.L.R.B. v. Virginia Electric & Power Co.,* 314 U.S. 469; 86 L. Ed. 348. The following extracts from that decision, establish clearly that the duty is imposed upon the Board, to draw their conclusions of coercion, etc., or non-coercion, *not* from isolated, selected acts or statements, but from the *composite picture presented* of the Company's *general attitude toward the Act and its objectives.*

"Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the *total activities* of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a *course of conduct* amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways."

• • • • •

"*If* the Board's order here may fairly be said to be based on the *totality of the Company's activities* during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a *complex of activities,* such as the anti-union background of the Company, • • •"

"• • • that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did."

• • • • •

"But from the Board's decision we are far from clear that the Board here considered the whole *complex of activities,* of which the bulletin and the speeches are but parts, in reaching its ultimate conclusion with regard to the Independent." *(National Labor Relations Board v. Virginia Electric & Power Co.,* 314 U.S. 469; 86 L. Ed. 348 at 354.)

Notwithstanding the clarity with which the court directed the Board that it must base its conclusion of coercion, etc., upon the *entire fabric* of facts demonstrating the *Company's overall attitude* ("whole course of conduct"); the Board shortly came before the Court in another case wherein it had apparently ignored this admonition. This was the case of *May Department Stores v. National Labor Relations Board,* 66 S. Ct. 203; 90 L. Ed. 131 (Adv. Op.).

That case involved an action taken by the Company before the Wage Stabilization Board, affecting the wages of some 4500 employees amongst which was a certified bargaining unit of 30 persons. The Board held that the Company's action as to 4500 employees "coerced" the 30 employees in the unit. The majority of the court concurred in this finding. But in setting aside a portion of the order, the Court again emphasized the necessity for a *"clear determination" by the Board, of the general attitude of the employer towards the purposes of the Act.* The court said at page 141 (Adv. Op.): (Empahiss supplied)

> "We think that, in the circumstances of this proceeding, although there is a violation of Sec. 8(1) as well as 8(5) the violation of 8(1) is so intertwined with the refusal to bargain with a unit asserted to be certified improperly that *without a clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally,* the decree need *not* enjoin the Company actions which are *not* determined by the Board *to be so* motivated."

The portion of the order (Paragraph 1(a)) applying to the specific technical violation found, was amended and affirmed, while the general or "blunderbuss" section of the order (Par. 1(b)) was stricken in its entirety, and the required textual amendments ordered.

During the interim between these cases, several of the Circuit Courts of Appeal had occasion to apply the rule laid down in the *Virginia Electric* case. Amongst (but not all-inclusive of) these cases were:

Budd Manufacturing Co. v. N.L.R.B., 142 Fed. (2d) 922, wherein the court for the Third Circuit said (at pages 927-928):

> "And what is the effect which the Board ascribes to the present 'slight suggestions' which it draws from the letter and the enclosure? Merely that Budd's expression of desire, that the Company's employees form their own union, operates to intimidate and coerce the employees into doing what they would not otherwise do in a free exercise of their guaranteed rights under the Act. In this day of enlightenment as to labor's legally established and widely recognized rights, we think that the Board's imputation is as disparaging of the intellect of the Company's employees as it is unrealistic."
>
> • • • • •
>
> "If there be any employees of the Company who do not know that, notwithstanding their employer's desires and wishes, they are wholly free to do whatsoever they will in the exercise of their right to self-organization and to bargain collectively by representatives of their own choosing, without fear of any discrimination or reprisal by the employer, then the words of this court's decree have failed to make plain what we think the decree actually provides."

The same court in *N.L.R.B. v. Blatt*, 143 Fed. (2d) 268, said at page 275:

> "We think that the contents of this notice, *standing alone*, cannot be deemed to constitute such an interference with, such a restraint or coercion of the respondent's employees in the exercise of the rights guaranteed to them by the Act as to constitute an unfair labor practice.
>
> But the contents of the notice must be considered *in conjunction with that posted on April 3rd and other facts completing the pattern of the respondent's conduct toward the Association and the Union.*"
>
> • • • • •

"The effect of what has been said or published can *never be appreciated except by consideration of the circumstances attendant upon speech or publication.*" (p. 273.)

The Circuit Court for the Sixth Circuit in *N.L.R.B. v. Brown-Brockemeyer,* 143 Fed. (2d) 257, mentions as a part of this general background, a fact which exists here, namely, that the acts complained of occurred *against the background of a signed union contract* with a union duly certified and recognized as the exclusive bargaining agent of the employees. It considered the Company's general attitude on unionization. It considered the lack of historical labor trouble in the plant, and the fairness of the neutrality notice which the Company had posted during union organization. It found no phase of threat or coercion in any of the acts complained of, when this background was considered.

Applying this principle to the case at bar and we find:

(a) ample support for the finding of the Circuit Court that no phase of hostility of the company to the purposes of the Act was shown.

(b) That against such a background, or standing alone, the acts and statements made to Victor Cane, afford no basis for any conclusion of "unwarranted prying" such as could constitute coercion, etc., forbidden by the Act.

The record discloses a period of many years, during which the employees enjoyed every privilege guaranteed by the Act, not only at Kansas City, but throughout the entire United States. A brief review of those facts, wholly ignored by the Board, is appropriate.

THE DEMONSTRATED COOPERATION AND ASSISTANCE TO THE PURPOSES OF THE ACT GIVEN BY THE COMPANY, REQUIRES PROOF OF STARTLING VIOLATIONS, BEFORE A HOSTILE ATTITUDE CAN BE INFERRED FROM ITS "WHOLE COURSE OF CONDUCT."

The Company operates some 35 meat packing plants throughout the United States. At the time of the hearing all but two of those plants and the 22,000 employees employed

at such plants were represented by one or the other of the two large national meat packing unions. The location of the plants, the union representing the employees at such plants, and the date of certification of such unions as exclusive bargaining agent for such employees is fully set forth at page 112 of the Transcript of Record filed herewith. It is significant to note that some of these representations, including the Kansas City plant, which is here involved, date back to 1937, nearly nine years ago. During all of the latter years, of that period, Master, Nation-wide Agreements have existed between the Company and the two major national unions, named on page 112 of the Transcript of Record, in which complete consummation of collective bargaining between the parties is evidenced. Twice during that interval the official reports of the War Labor Board indicate that disputes between these national unions and the petitioner were resolved by proceedings before that Board *(Four Meat Packing Companies,* 6 W.L.R. 395, and 21 W.L.R. 652).

It is further significant that the original recognition of the union involved in this case was by the Company's stipulation to a *consent* election (115). A search of the reports of the Board and of the courts reveals that even accusations of unfair labor practices on the part of this Company are conspicuous by their almost total absence. In addition to the 35 packing plants and of the thousands of employees there employed, the records of the Board reveal numerous certifications of unions at the Company's fertilizer plants, creameries, cheese factories, egg processing plants, milk condenseries, branch houses, oil mills and phosphate mines, at which thousands of other additional employees are employed and represented by unions.

It is significant to note that in the entire eleven years which have elapsed since the passage of the Act, up to the inception of this case, this Company, employing tens of thousands of employees, has been charged with discriminatory discharge of employees in but six cases prior to the present case, involving in the aggregate 28* employees.

After full hearings before the Board its decisions*

*8 N.L.R.B. 11; 14 N.L.R.B. 682; 25 N.L.R.B. 989; 32 N.L.R.B. 536; 46 N.L.R.B. 629 and case No. XVIII-C-548, Huron, S. Dakota, unreported because settled by Company acceptance of the Examiner's Report.

show that 21 of those 28 discharges were justified and that there had been no violation of the law in connection therewith.

As to all but one of the remaining employees the records of the Circuit Courts of Appeal show no resistance to the Board's direction. The only time that Armour and Company appears in any of the records of the Circuit Courts of Appeal as a party contesting an order of the National Labor Relations Board in the entire eleven year life of the Act is found in *National Labor Relations Board v. Armour and Company,* 129 Fed. (2d) 316, wherein an order of the Board to make restitution to a single employee was challenged as not supported by sufficient evidence.

These and many other similar facts of record which could be cited supply the foundation for the following finding of the Circuit Court in the case below:

> "There is nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act."

This, then is the established background against which all of the facts found by the Board must be judged. Only by separating the acts and statements of the Company from this established course of years of observance and compliance with the Act is the Board able to draw its conclusions of violation of the law.

THE ACTS AND QUESTIONS ASSERTED TO CONSTITUTE "UNWARRANTED PRYING INTO" UNION AFFAIRS, EVEN STANDING ALONE, CONSTITUTE NO EVIDENCE OF COERCION, INTERFERENCE OR RESTRAINT OF ANY KIND, OR OF ANY HOSTILITY TO THE ACT.

The statements relied upon by the Board to sustain its finding of coercion, etc., are established by the testimony of a single witness, Victor Cane. They consisted of:

(a) a conversation with Bill Elder (Tr. 197-200) (at which Cane alone was present).

(b) a conversation with Mr. Cerf (Tr. 201-203) (at which Cane alone was present).
(c) a conversation with Mr. Thompson (Tr. 200-201) (at which Cane, Braseal and Hess were present. Neither Braseal nor Hess were called as witnesses).

Cane volunteered the following as to all three of these conferences (Emphasis supplied):

> "*Everyone of them said, we have no objection whatsoever to you having a union,* but every time we would have a meeting, they could call somebody in the next day or two afterwards and talk to them about what had gone on at the union meeting." (Tr. 216.)

(There is not a scintilla of support for Cane's incompetent assumption that the "somebodys" who were "called in" discussed union affairs.)

There is also the fact that for more than two months following these conferences, Cane's superior was making every effort to locate Cane at his regular salesman's job, in a territory to his liking. Only after three jobs were offered, each at an increased salary, and after each was refused, was Cane let out. And the Board found no wrong in that action.

The only language resembling a threat was Elder's statement "I can fire you for this *but I won't.* I want to find out what your difficulties are." (Tr. 199.) While Cane disclaimed any knowledge of what Elder meant by "this", the context indicates clearly what Elder meant. Elder was general sales manager out of the Chicago office. He no doubt thought that Cane knew of the Company rule against union solicitation on Company time. To assume otherwise is to reach the absurd conclusion that Elder said simultaneously "You are free to join a union you want to" and "I can fire you if you join, but I won't."

The essence of Cerf's inquiry was stated by Cane as follows:

> "A. Well, he asked me why we—asked me something about the petition, that we had had out there, said that he was kind of lost because it started in his

department, and he didn't know a thing about it *until we mentioned it to him,* somebody else mentioned it to him." (Tr. 202.)

The essence of Thompson's conversation was:

"A. He wanted to know why we had started this petition, and we all told him that we thought it would be better, have better job security if we had a union in there, and that it would justify some of the things that were going on in there that wasn't fair, and I mentioned the fact that there was some guys being hired there at 35, in between $32.50 and five a week and fellows right across the desk from them were making $25 and he said that due to the conditions of the war and everything, that they had to pay more money to bring, to hire help, and I told him that I thought if they paid more money to hire help that the fellows already working there were justified in getting more money.

Q. Was the union at Swift's brought into the conversation?

A. Yes, we did mention the union at Swift's.

Q. Did Mr. Thompson say anything about that?

A. He said if the union at Swift's was so hot, he asked us why it hadn't went on into the office, and I think it was Tom Braseal that told him that Swift and Company had also treated their employees a little bit more courteous than Armour and Company.

Q. Did Mr. Thompson see the petition?

A. Yes, he saw it.

Q. And how did that occur?

A. Well, he asked for it.

Q. And what happened then?

A. Well, he looked it over and read the names and he mentioned that a lot of them that we had on there hadn't been with Armour and Company very long, and he also saw some of them that had been on there for a long time and he kind of laughed about the fellow that had signed it that had been there for a number of years.

* * * * *

Q. About how long did this conversation occur with Mr. Thompson?

A. How long did it last?

Q. Yes, about how long did it last?

A. An hour or an hour and a half, somewhere along in there.

Q. And how was it terminated?

A. Well, Tom and Ed and I was in there and Mr. Cerf came to the door and told us, I don't know whether he said we could break it up or asked something about, told Mr. Thompson we would have to get back out there, we just had some orders that came in, we have to put them on through, so it broke up." (Tr. 200-201.)

There we have the Board's entire case. Standing alone, there is no scintilla of coercion, interference or threat and *Cane so admitted* (216). And when these innocent inquiries are viewed before the background of many years of organization recognition, collective bargaining, and obedience to Board orders in scores of plants throughout the Nation, the language of the court of the Third Circuit is brought to mind:

> "If there be any employees of the Company who do not know that, notwithstanding their employer's desires and wishes, they are wholly free to do whatsoever they will in the exercise of their right to self-organization and to bargain collectively by representatives of their own choosing, without fear of any discrimination or reprisal by the employer, then the words of this court's decree have failed to make plain what we think the decree actually provides." *(Budd Mfg. Co. v. N.L.R.B.,* 142 Fed.(2d) 922 at 928.)

We respectfully submit that the record contains no evidence that Cane was coerced, interfered with or restrained in any respect, save in the matter of circulating the petition on Company time, a right affirmed by this Court in *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793; 89 L. Ed. 1372.

"PRYING INTO" UNION AFFAIRS IS NOT *PER SE* A VIOLATION OF THE ACT. IT IS PROHIBITED ONLY IF IT IS ACCOMPANIED BY OTHER ACTS OR STATEMENTS, SO THAT FROM THE WHOLE FABRIC OF COMPANY CONDUCT, COERCION, ETC., MAY BE REASONABLY ASSUMED.

The use of the word "prying" by the Board connotes a certain degree of surreptitiousness, which implication the record utterly fails to support. It also connotes secrecy of the attempt to gain information without the knowledge of the union or its members. No fact of record warrants such a connotation. Cane freely told Cerf of the effort without solicitation (202). Early in the history of the interpretations of the Act, it was held that proof of innocent questioning by the employer as to the union status of its employees, or the innocent receipt of voluntary information, each without accompanying circumstances indicating possible intimidation, was not the "substantial evidence" of coercion which the Act required for support of a Board order. *(N.L.R.B. v. Botany Worsted Mills,* 106 Fed. (2d) 263 at 267-269.) A search of the Federal Citator indicates no modification of the view there expressed.

In the more recent decision of *N.L.R.B. v. East Texas Motor Freight Lines,* 140 Fed. (2d) 404, the Circuit Court for the Fifth Circuit went further than to consider the evidential value of such inquiries, and held the employer *entitled to make such inquiries as a matter of right,* under the Constitutional privilege of free speech. This decision clearly establishes that such innocent inquiries, unless accompanied by other facts or statements warranting an inference that coercion was intended, are within the law. In the case at bar, every inquiry relied upon was accompanied by the assurance to the employee "we have no objection whatsoever to you having a union." (Tr. 216.)

Even if the record revealed that surreptitiousness and secrecy of effort implied by the Board's phrase "prying into", it has been held that even the secret employment of detectives or other spies is not *per se* a violation of the Act. In *Press Company, Inc., v. N.L.R.B.,* 118 Fed. (2d) 937 at

page 944, the Circuit Court of Appeals of the District of Columbia said:

> "The Board's finding on this evidence is that 'respondents have kept under surveillance the meetings of the guild and the activities of its members' and thus violated Sec. 8(1) of the Act.
>
> "This is the equivalent of saying that surveillance *ipso facto* violated the law, and the Board relies upon a long list of cases to sustain such a doctrine. We have examined the cases relied upon, and we are unable to say that any one of them unqualifiedly so holds, and a recent decision in the Ninth Circuit is to the effect that *surveillance, unaccompanied by interference, coercion, or restraint, is not an unfair labor practice.*"

In *Montgomery Ward v. N.L.R.B.*, 115 Fed. (2d) 700, the Circuit Court of the Eighth Circuit said:

> "For the purposes of this opinion, we shall assume, without deciding, that proof of the maintenance by an employer of a system of espionage, one of the purposes of which is to secure information relative to the attitude of his employees toward self-organization, joining a union, and kindred matters, is *not alone sufficient,* to justify a finding that Sec. 8(1) of the Act has been violated by him."

Wherever orders directed against employer surveillance have been sustained, the judicial consideration of the subject has been solely from the evidential point of view. The holding is, in substance, that espionage or surveillance, when accompanied by *other* evidence of union hostility, may constitute evidential support for a finding of coercion, etc. (*Link Belt Co. v. N.L.R.B.*, 311 U.S. 584, 85 L. Ed. 369; *N.L.R.B. v. Fruehauf Trailer Co.*, 301 U.S. 49; 81 L. Ed. 582; *Humble Oil and Refining Co. v. N.L.R.B.*, 113 Fed. (2d) 105; *N. Y. S. L. R. B. v. Shattuck*, 20 N. Y. Supp. 949; *Atlas Underwear Co. v. N.L.R.B.*, 116 Fed. (2d) 1020; *Bethlehem Steel Co. v. N.L.R.B.*, 120 Fed. (2d) 126; *N.L.R.B. v. Baldwin Locomotive Co.*, 128 Fed. (2d) 39; *N.L.R.B. v. National Motor Bearing Co.*, 105 Fed. (2d) 652.)

Not one of these cases is appropriate here because:

(a) there is no accompanying "clear determination by the Board" of union hostility on the Company's part,—in fact the evidence supports the Circuit Court's finding of total observance of the Act.

(b) there are no accompanying threats or acts which, in conjunction with the "prying into", lead to the conclusions of coercion.

Standing alone, and unsupported, the "prying into" is controlled by the *Press Co.* and *Montgomery Ward* cases, first above cited. It is not substantial evidence of coercion or other violation of the Act, considered against the background of years of compliance with the Act. The innocent and friendly inquiries establish no basis for any order.

THERE IS NEITHER A "CLEAR DETERMINATION" BY THE BOARD OF ANY "ATTITUDE OF OPPOSITION TO THE PURPOSES OF THE ACT", ON THE PART OF THE COMPANY, NOR ANY EVIDENCE OF RECORD IN SUPPORT OF SUCH A CONCLUSION. THE EVIDENCE SUPPORTS THE FINDING OF THE CIRCUIT COURT THAT *"ARMOUR DID NOT INTEND TO VIOLATE* THE NATIONAL LABOR RELATIONS ACT. THERE IS NOTHING IN THE RECORD TO JUSTIFY THE CONCLUSION THAT ARMOUR ENTERTAINS AN ATTITUDE OF OPPOSITION TO THE ACT."

In spite of this finding by the Circuit Court, and in spite of the near decade of compliance with and observance of the Act by this Company, indisputably shown, the court would still enjoin us from "making inquiries" of our employees as to their union status. We respectfully submit that under the doctrine of the *May* case, the court's finding that no hostility to the Act existed, and under the decisions that mere inquiries, unaccompanied by threats, are *not* prohibited by the Act, but within the constitutional rights of the employer, the court has no power to enjoin that which *per se* is not unlawful.

The repercussions following an affirmance of this order would be serious. At every Armour packing plant in the United States, the contracts existing since this decision was made, carry the usual "check off" of union dues. Every month lists containing thousands of names of employees who are members of the union are voluntarily handed us. Every month we find names omitted which were on the previous month's list. Every month we find new names appearing. And every month we find mistakes in the lists submitted. In case of an omitted name, Armour's practice is to inquire "Has Joe resigned, died, or has the union expelled him?". In case of new names the practice is to inquire "Did you join the union last month, or is your name on the check off list through error?". Corrections are made, the union is advised, and the dues withheld or not withheld in accordance with the facts developed. This practice can be followed *only in contempt of court, if the order of the Circuit Court is affirmed.*

ONCE ORGANIZATION IS COMPLETED, AND A CONTRACT SIGNED AND IN EFFECT, KNOWLEDGE OF THE UNION STATUS OF AN EMPLOYEE IS OF NO MATERIAL ADVANTAGE TO THE EMPLOYER, OR RESULTS IN NO POSSIBLE HARM TO THE EMPLOYEE.

The importance of the employer's knowledge as to the union affiliations of his employees, *entirely disappears when the unionization is complete and a contract is signed,* particularly where as here it contains a "check off" provision. The Company knows that it must bargain with the union for every person in the unit, whether such person is a union member or not. The addition of new union members, or the resignation of former union members does not affect his contractual status in the least (barring of course the effect of such union security clauses as the contract may contain).

A POSSIBLE EXCEPTION.

There is but one respect wherein a sound argument can be advanced to the effect that even the basest type of employer espionage or surveillance can interfere with the rights of employees after a contract is signed under the

Act. We shall cover the subject in detail in Part II of this argument, so little more than mention need be made here.

One of the primary objectives of the Act, declared in Section 1 of the Act, is the attainment of *"equality in bargaining power"* between an employer and his employees. If it should appear that through espionage or "prying into" union affairs, the employer had gained knowledge which destroyed that equality of bargaining power which the Act seeks to attain, then and *only* then, could an order of the Board prohibiting further action of that sort, be in any way construed as "necessary to effectuate the policies of the Act." Such a situation might exist where an employer learned through secret channels that the union membership had been so depleted by resignations and strife, that the bargaining agent could not in fact enforce its demands by any display of economic force. We know of no case of this type. We mention it here as a necessary corollary to the basis for our argument in Part II, to the effect that the Board's power to order ends when the purposes of the Act, and particularly equality of bargaining power, have been attained.

PART II. THE CASES OF CORNFORTH, COWGER AND DONAHUE.

ONCE THE OBJECTIVE OF THE ACT, "EQUALITY OF BARGAINING POWER," IS ATTAINED, THE POWER OF THE BOARD ENDS.

1. The powers of the Board to order affirmative action are limited by Section 10(c) of the Act, to orders which "will effectuate the policies of the Act". The necessary converse is that if the affirmative action order *in*effectuates or defeats the policies of the Act, the order is *ultra vires* and void. A primary "policy of the Act" clearly stated in Section 1, is the creation and maintenance of *equality of bargaining power* between employer and employee. An order for affirmative action is valid if it creates or maintains that objective—invalid if it creates inequality of bargaining power.

We need go no further than the Act to establish that both the employees and the employer are guaranteed *equality* of bargaining power by that Act. Section 1 recites that, before the passage of the Act, corporate and other man-

agement association created such a bargaining advantage of employers over employees as to affect the flow of commerce. But the Act does *not* say that the needs of commerce require that the employer be placed at a bargaining disadvantage as compared to the employee. Furthermore it is clear from the language of the Act that this equality is *not* to be gained by *deprivation* of existing employer rights. It is to result from the creation of new additional and equalizing rights of employees by reason of which *equality* in bargaining power is to result.

To this end the Act provides certain rights with which the employees shall be endowed, for the purpose of creating *equality* in bargaining power derived through extended equality in organization. There is no word or syllable indicating that the employer shall suffer any *loss* of rights in order to bring about equality. He retains all he had before the Act. And it is clearly stated that the Board may not order any affirmative action to be taken, which shall destroy that equality of bargaining position.

A necessary conclusion would seem to be that when, by cooperative action of employer and employee, it appears that the employees generally were enjoying, and for years had enjoyed, *every right with which the Act endowed them, all had been done which Congress believed should be done.* If, by such endowment "equality in bargaining power" in fact existed, from what language of the Act emanates the power of the Board to further "*effectuate policies* which had *already been completely effectuated in accordance with the requirements of the law* by action of the parties?

This court has said "the sanctions of the Act are imposed *not* in punishment of the employer, but for the protection of the employee." *(Virginia Power & Electric Case,* 314 U.S. 469 at 477; 86 L. Ed. 348 at 354.) This thought is borne out by the form of statement of those sanctions found in the Act. There is no *general* prohibition against coercion of, interference with, or restraint of employees. The Act leaves the employer free to coerce, interfere and restrain as he pleases, so long as he protects "the exercise" by employees of the "rights guaranteed by Section 7 of this Act" from his coercion, etc. He may dominate, or interfere with,

or financially support any organization of his employees he pleases except a *labor* organization. He may wantonly discriminate as to hire, tenure or any term or condition of employment, so long as his action neither encourages or discourages membership in a labor organization. And he may refuse to bargain collectively with any one save an individual or labor organization collectively selected by his employees to represent them.

It follows that if the Board orders him to recall action which in no way interfered with any of those rights, of his employees, but which was essential in protection of his equality of bargaining power, the order is void.

We need not repeat here the background of union recognition, collective bargaining, employer-union cooperation and freedom from chastisement at the hands of the Board or the courts which this Company has enjoyed since the passage of the Act. That history is recited, Part I of this argument. Suffice it to say here that throughout the Nation, employees, tens of thousands of them—of this Company have enjoyed

(1) the right to self organization,
(2) the right to form, join or assist labor organizations,
(3) the right to bargain collectively through representatives of their own choosing,
(4) the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

These are all the rights guaranteed by Section 7. But it may be said that we have not extended these rights to *all* our employees. It will be said that this case involves three employees to whom these rights were not extended. This we deny. And our denial is based upon undisputed fact.

In effecting the transfer every right of the employees under Section 7 was recognized and preserved.

Without restating the facts heretofore set forth in our opening statement of the case it will be recalled that the industrial engineering department was called into Mr.

Campbell's office and read a statement which is fully set forth at Pages 180-182 of the record. The statement began with a statement of the purposes of the meeting. It was clearly stated that union membership was open to all, without fear of retaliation and that employees' rights were protected by law. The established friendly employer-union relation was cited. Assurance was given that no one would be discharged. Every right guaranteed by Section 7 was carefully preserved.

There was an absolute interference, coercion, etc. *not* with any "right guaranteed" these employees under the Act, but with their right to continue to have access to confidential information of the Company. Nothing in the Act forbade such coercion etc. so long (as was the case here) as the employees' four rights under Section 7 were clearly preserved.

Without going further, such action is not prohibited by the Act. But if we carry the facts one step further, and demonstrate that the employer's action was essential to the preservation of his equality of bargaining position, the Company's action becomes not merely unforbidden by the Act, but fully warranted and justified by it.

In our petition, we have demonstrated the unequal and almost helpless bargaining position of an employer whose most confidential affairs (labor costs, job standards, etc.) were accessible through Union members to the Union. We will not repeat it here. No fair person of even slight experience would indulge in the sophistry that the employer should wait until he could prove that an employee had revealed these secrets, then discharge him. This is to reason that the law forbids padlocks because the thief may be jailed. It is to ignore that the thief may not be apprehended until, by raid after raid, the premises have been completely looted.

What the employer did in this case was to padlock the door in part (we could not withhold from the Union facts which these employees might carry in their memories) by placing these employees in other positions where they could not have daily knowledge of the fluctuations in labor costs,

and of other equally vital information. Its sole purpose was to protect that equality of bargaining position which is guaranteed it by the very Act it is said to have violated. So long as every right of these employees under Section 7 was preserved (as they clearly were) the company had every right to make the transfer. Not only was the right to transfer unforbidden by law, but, being essential to the protection of equality in bargaining, it was guaranteed by law.

The total unfairness of the Board's position may be illustrated by reversing the positions of the parties, and by comparing the effects of Union espionage upon employer affairs (which the Board not only approves but enforces here) with Employer espionage of Union affairs (which the Board has always condemned, sometimes to such length that its condemnations have been set aside).

What language of the Act authorizes the Board to condemn harmless "prying into" Union status of an employee by the Company, long observant and obedient to the Act, and at the same time permits the Board to require the Company to place its most confidential matters in the hands of Union members, whose rights under Section 7 have been fully preserved?

THE CIRCUIT COURT HAS APPROVED A PENALTY FOR AN ACT FOUND BY IT TO HAVE BEEN LAWFUL.

The Court has found that we need not restore these three persons to the identical positions from which they were transferred. The effect of this finding is to sustain the petitioner's right to protect itself from Union espionage of facts which would destroy the Company's bargaining equality. Yet damages are sustained.

The undisputed evidence shows thus the nature of the positions from and to which these employees were transferred were practically identical save in two respects—access to confidential information and, *temporarily*—wages. But if it is believed that the slight temporary differences in the hourly wages of these employees, standing alone, re-

quires restitution of wages lost because of the transfer, we will gladly comply with an order of the Court requiring us to make whole the employees for the slight differences in earnings at their old and new jobs, for such time as any difference would have existed. We would voluntarily have continued their current wages, save for a provision in the existing Union contract providing that employees transferred into a new department must start at the basic wage rate in the department. That they were not so paid is attributable solely to a contract with the Union which these persons sought to join. We will welcome an order relieving us from that contract obligation to these three persons.

IF RESTITUTION WERE APPROPRIATE THE AMOUNT THEREOF SHOULD BE LIMITED TO THE DIFFERENCES BETWEEN THE OLD AND NEW RATES FOR SUCH TIME AS THE EMPLOYER FAILED TO MAKE GOOD HIS PROMISE OF RAPID PROMOTION AND COMPENSATION, AT THE FORMER RATES OR HIGHER.

This Court, in the *Phelps-Dodge* case 313 U.S. 177, 85 L. Ed. 1271, protected the employer from liability for damages wilfully incurred by the employees. We respectfully submit that if there was any damage in this case it was wilfully and knowingly created and caused by these three employees. Using Mrs. Cornforth's rates as typical, she was earning 62½ cents per hour. The transfer would have reduced her compensation to 59 cents per hour. She claims damage (and the Board approves her claim) for the entire 62½ cents per hour.

It was in Mrs. Cornforth's power to reduce the measure of that damage to 3½ cents per hour, for such period of time as might elapse between her acceptance of the new, similar task and her employer's promised promotion. By her own wilful act she created 59 cents per hour of the damage claimed by her. The transfer did not involve any difficult, unpleasant or degrading work, nor require her presence in any part of the premises to which she was not thoroughly accustomed in her former job.

We do not think the Board or the Court should have ignored the well known rule, that a person, though believing himself injured, is bound to mitigate and reduce the resulting damage to the minimum.

Summarizing, there is no evidence that any of these employees was discharged. The Company's action in transferring these employees from one position to a similar one, must be judged against the background of a near decade of cooperation and peaceful relations with the Union. The record discloses no background of Union hostitlity or of opposition to the purposes of the Act.

The Act does not require employee subservience to employees' organization. It does not approve nor permit Union espionage upon Company confidences. *Every* right is retained by employers to protect those confidential matters by any means at their disposal, just so long as the record discloses that adequate steps were taken, as here, with painstaking regard for every right guaranteed the employees by Section 7 of the Act.

We submit that our petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES J. FAULKNER,
FREDERICK R. BAIRD,
PAUL E. BLANCHARD,
4301 South Racine Avenue,
Chicago 9, Illinois
and
HUFFMAN, SUTLIFF & ROGERS,
411 Ernest and Cranmer Building,
Denver, Colorado,
Attorneys for Petitioner,
ARMOUR AND COMPANY.

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